Supreme Court, U.S.
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No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intra-state waters solely because those waters do or potentially could serve as habitat for migratory birds.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is the Solid Waste Agency of Northern Cook County, a municipal corporation created by intergovernmental agreement under the laws of Illinois. Its member communities are the cities and villages of Arlington Heights, Barrington, Buffalo Grove, Elk Grove Village, Evanston, Glencoe, Glenview, Hoffman Estates, Inverness, Kenilworth, Lincolnwood, Morton Grove, Mt. Prospect, Niles, Palatine, Park Ridge, Prospect Heights, Rolling Meadows, Skokie, South Barrington, Wheeling, Wilmette, and Winnetka. Petitioner has no parent corporations and no subsidiaries, wholly-owned or otherwise.

Respondents are the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency; Arthur Williams, Lieutenant General, Chief of Engineers, U.S. Army Corps of Engineers; Robert E. Slockbower, Lieutenant Colonel, Chicago District Engineer, U.S. Army Corps of Engineers; Togo D. West, Jr., Secretary of the Army; Carol M. Browner, Administrator, U.S. Environmental Protection Agency; and intervenors below, the Village of Bartlett and Citizens Against the Balefill.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (Pet. App. 14a-36a) is reported at 998 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. Justice Stevens extended the time for filing the petition for certiorari to January 14, 2000. The petition was filed on that date and granted on May 22, 2000. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause provides that "Congress shall have the Power * * * [t]o regulate Commerce with foreign nations and among the several States." U.S. CONST. art. I, § 8.

Relevant provisions of the Federal Water Pollution Control Act of 1972 ("Clean Water Act" or "CWA") are reproduced at Pet. App. 37a-38a. The "other waters" regulation and "migratory bird rule" are set forth at Pet. App. 39a-40a.

Of particular relevance here, CWA § 101(b) declares that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b).

STATEMENT

The Clean Water Act prohibits "any person" from discharging "any pollutant," including "dredged or fill material," into "navigable waters" without obtaining a permit from the U.S. Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps has by regulation defined the "waters of the United States" to include not only waters that are or could be used for navigation, tidal waters, interstate waters, tributaries

of jurisdictional waters, and wetlands adjacent to jurisdictional waters (33 C.F.R. § 328.3(a)), but also

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce * * *.

Id., § 328.3(a)(3) (the "other waters rule"); see also 40 C.F.R. § 230.3(s) (EPA's essentially identical regulation).

In the *preamble* to Clean Water Act regulations promulgated in 1986, the Corps further defined these "other" waters:

> EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines * * *.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This "migratory bird rule" is at issue here. Petitioner Solid Waste Agency of Cook County (SWANCC) contends that the Clean Water Act does not, and constitutionally may not, authorize federal jurisdiction over isolated, intrastate, water-filled trenches and depressions located on SWANCC's land solely because they provide habitat for migratory birds.

A. The Solid Waste Agency's Balefill Project

SWANCC comprises 23 suburban Chicago cities and villages located in north and northwest Cook County, Illinois. Members of the Northwest Municipal Conference pursuing "a comprehensive action plan for regional solid waste disposal" formed SWANCC in 1988 as a Municipal Joint Action Agency under Illinois law. AR 15-17, 44682-83.[1] The Illinois Solid

[1] "AR" refers to the Administrative Record before the Corps. The Corps' July 1994 decision denying SWANCC's revised Section 404 permit application is set out at AR 15572-15847. The Corps' January 1991 decision denying SWANCC's prior application is at AR 44682-44743. Copies of both decisions have been lodged with the Clerk. SWANCC's revised permit application is at AR 1-1492, 1751-2113.

Waste Planning and Recycling Act "encourage[s]" such "intergovernmental cooperation agreements whereby various units of local government within a region determine the best methods and locations for disposal of solid waste." 415 ILCS 15/2(5).

SWANCC is charged with the cost-effective and environmentally sound management of non-hazardous solid waste for the 700,000 people in its member communities. To that end, SWANCC adopted what the Corps called "an admirable plan" to manage waste for 20 years, emphasizing waste volume reduction, recycling, composting, and other means to divert 40-45 per cent of solid waste from disposal in compliance with the Solid Waste Planning and Recycling Act (415 ILCS 15) and Illinois Environmental Protection Agency rules (35 ILL. ADMIN. CODE Part 870). AR 17, 44683-86.

Nevertheless, in light of diminishing landfill capacity in the region, which was "reaching a critical level," SWANCC also needed to develop a new landfill.[2] Pet. App. 2a; AR15-17, 44684-85. Accordingly, SWANCC purchased land to create a balefill—a landfill for disposal of baled, non-hazardous waste. SWANCC's proposed balefill would "only accept [municipal] waste [from SWANCC communities] that has been compacted and baled at [SWANCC-owned] transfer stations to be constructed in northwest Cook County." AR 18, 725, 747, 15576,

[2] Illinois law recognizes that landfills "continue to be necessary," that "landfill capacity is decreasing," and that siting new landfills "is very difficult due to the public concern and competition with other land uses." Illinois Solid Waste Management Act, 415 ILCS 20/2(2), (3), (10)(b). See ILLINOIS EPA, AVAILABLE DISPOSAL CAPACITY FOR SOLID WASTE IN ILLINOIS 14 (1987) ("facility sitin[g] can elicit an emotional response * * *. The 'not in my back yard' or NIMBY syndrome has become a prevalent sentiment"), AR 45.

44683-84; Pet. App. 2a. SWANCC's costs for this project exceeded $16 million by 1992. AR 5535.

B. The Balefill Site

Of the 533-acre parcel it purchased, SWANCC proposed to use 410 acres, located in Cook County, for the balefill. Almost 300 of those acres had been used for sand and gravel strip mining from the 1930s to the 1950s, which left alternating linear spoil ridges and excavation trenches across the land. An "early successional stage forest" developed on this part of the property after strip mining ended. The trenches and other depressions left by the mining formed permanent and seasonal ponds ranging from less than one-tenth of an acre to several acres in size and from several inches to several feet in depth. SWANCC's balefill project would require filling 17.6 acres of these "semi aquatic" areas. Pet. App. 2a-3a; AR 205.

"No Federally threatened or endangered species utilize the [balefill] site." AR 44713. The site does contain a large seasonal rookery of great blue herons—"locally appreciated" wildlife, the Corps concluded, that "adds to the aesthetic appeal of the region." AR 15700. Another "100-plus" bird species have been observed "nesting, feeding, or breeding at the site," including "water-dependent" and "migratory birds." Pet. App. 2a-3a.[3] Three species listed by the State of Illinois as threatened or endangered, which "use wooded nesting habitats in close proximity to water," have also been observed—the red-shouldered hawk, Cooper's hawk, and veery. AR 44709, 44713, 15578.

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[3] The Corps identified at or near the site one or more examples of 13 migratory bird species "known to depend on aquatic environments for a significant portion of their life requirements": "the Great Blue Heron, Great Egret, Green-backed Heron, Black-crowned Night Heron, Canada Goose, Wood Duck, Mallard, Greater Yellowlegs, Belted Kingfisher, Northern Waterthrush, Louisiana Waterthrush, Swamp Sparrow, and Red-winged Blackbird." AR 15578.

SWANCC proposed to mitigate the impact of the balefill on these birds at a cost exceeding $17 million. AR 15710. Its original plans called for filling 31 acres of ponds (AR 44706), but it modified the project to reduce fill to 17.6 acres. Pet. App. 3a; AR 15574. It proposed to create 17.6 acres of replacement waters on the site (AR 15711); relocate the heron rookery elsewhere on the property and, if that failed, to purchase for the public or improve another rookery in the region (AR 15697-98); phase construction over 15 years to minimize disturbance (AR 15704-06); enhance forest and waters that remained on the property; and acquire 258 acres of land adjacent to the site to create or improve forest habitat. AR 15701-02.

C. The Cook County Permitting Process

The Clean Water Act states "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b). Cook County and the State of Illinois carefully exercised those traditional responsibilities in this case. In order to proceed with its balefill project, SWANCC had to obtain approvals from both the county and State, through two elaborate and laborious permitting procedures.

The Northwest Municipal Conference optioned the balefill site in 1985, before SWANCC came into existence. In accordance with Illinois law recognizing "the authority of units of local government in the siting of solid waste disposal facilities" (415 ILCS 15/2), the Conference applied to the Cook County Zoning Board of Appeals in 1987 for a special use planned unit development ("PUD") permit for the balefill. Factors considered by the Zoning Board in reviewing this application included effect on surrounding properties, need for the project, and whether the special use would "be detrimental to * * * the public health, safety, or general welfare." Cook County Zoning Ord. §§ 13.10-7, 9-4 (1976). After conducting 10 public hearings and compiling "by far the largest record of proceedings in [its] history," the Zoning Board recommended approval

of the permit. AR 48. The Cook County Board of Commissioners subsequently approved the PUD by a 75% majority. *Ibid.*

In January 1990, the County Board enacted an ordinance approving SWANCC's plans. AR 48, 724-727. The ordinance recited that SWANCC had filed satisfactory Domestic Water Protection and Home Value Guaranty Plans, had added more "environmental protections," and would "provide for perpetual post closure monitoring of the balefill." AR 742-725. It required SWANCC to contribute $1 million to a trust for each year the balefill accepts waste, to guarantee post-closure maintenance and remedial action. AR 726.

D. The Illinois EPA Permitting Process

SWANCC also had to obtain a landfill development permit from the Illinois EPA, required by the Illinois Environmental Protection Act (Ill. Stat. Ch. 111 ½ § 1039 (1988)) and Pollution Control Board Solid and Special Waste Management Regulations. 35 ILL. ADMIN. CODE § 807.201 (1988).

The Illinois EPA has a mandate "to restore, maintain and enhance" the "waters of the State" and "to assure that no contaminants are discharged" into those waters. Ill. Stat. Ch. 111 ½ § 1011(b) (1988).[4] It rejected SWANCC's first, 1988 permit application. In 1989, SWANCC submitted a revised, 1,700-page application. After additional public hearings, the Illinois EPA approved a development permit in November 1989, subject to 51 conditions relating to the construction, operation, and monitoring of the balefill. AR 50-51, 747-754.[5]

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[4] "[W]aters of the State" include those on SWANCC's property. See Ill. Stat. Ch. 111 ½ § 1003.56 (1988) (waters of the State are "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within * * * this State"). A "contaminant" includes "any solid * * * matter * * * from whatever source." *Id.* § 1003.06.

[5] Many conditions were to protect groundwater, over which the Illinois EPA has express statutory authority. Groundwater Protection Act, 415 ILCS 55 (1998); 35 ILL. ADMIN. CODE Part 620 (1997).

The agency specifically approved SWANCC's "closure and post-closure care plans." AR 750.

The Illinois EPA's "engineering judgment," certified to the Corps of Engineers under CWA § 401, 33 U.S.C. § 1341(1), was that SWANCC's project would not "caus[e] water pollution as defined in the Illinois Environmental Protection Act" if it was "carefully planned and supervised." AR 772, 6163. The Illinois EPA thus concluded that the balefill would not cause

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

Ill. Stat. Ch. 111 ½ § 1003.55 (1988).

Subsequently, the Illinois Department of Conservation reviewed SWANCC's plans, including its plans to mitigate the impact of the balefill on wildlife. The Department reported to the Corps of Engineers that "adverse impacts on state listed species would be mitigated through the implementation of the mitigation plan" provided certain recommendations were followed, and that it was "satisfied" with SWANCC's "heron mitigation plan" in light of "the increasing number of rookeries statewide in recent years." AR 15586.[6]

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[6] The Illinois Nature Preserves Commission and Endangered Species Protection Board, which expressed some concerns about SWANCC's balefill to the Corps (AR 15587-89), are subdivisions of the Department of Conservation (now Department of Natural Resources), which approved the plan. Endangered Species Protection Act, 520 ILCS 10/6, 10/10 (1998); Natural Areas Preservation Act, 525 ILCS 30 (1998); Illinois Department of Natural Resources, <http://dnr.state.il.us/dnrorg.htm> (visited July 18, 2000); see 33 C.F.R. § 320.4(j)(3) (requiring the Corps to determine "the official state position").

E. The Corps Of Engineers' Assertion Of Jurisdiction

Because the balefill project called for filling trenches and depressions within the forested area of the site, the Northwest Municipal Conference twice requested rulings from the Corps as to whether it required a CWA Section 404 permit to discharge fill material into navigable waters. 33 U.S.C. § 1344(a). Responding to a "letter requesting a determination of [the Corps'] jurisdiction over the proposed balefill site," the Corps informed the Conference in April 1986 that "the proposed balefill site is not subject to our regulatory authority." AR 777, 34594. The Conference's second request for a determination of Corps' jurisdiction met with the same disclaimer of jurisdiction in March 1987. AR 779, 34598; Pet. App. 3a-4a, 16a.

The Corps changed its position after the Illinois Nature Preserves Commission informed the Corps in July 1987 that a brief site visit resulted in the observation of migratory birds. AR 34611-13. In November 1987, the Corps "determined that the water areas of the abandoned gravel pit do qualify as 'waters of the United States,'" and were therefore within its "regulatory authority," based on "three criteria: (1) that the proposed balefill site has been abandoned as a gravel pit; (2) that the water areas and spoil piles have developed a natural character; and (3) that the water areas are used or could be used as habitat for migratory birds which cross state lines." AR 780. The first two criteria reflect the fact that the Corps does not claim authority over "pits excavated in dry land for the purpose of obtaining fill, sand, or gravel" unless the "excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." 51 Fed. Reg. 41,206, 41,217 (1986). The Corps' third criterion, applying its bird rule, was its sole basis for concluding that SWANCC's property includes waters of the United States.

F. The Corps' Denial Of A Section 404 Permit

Once the Corps claimed jurisdiction over the semi-aquatic areas of the balefill site based on the presence of migratory

birds, SWANCC could not proceed with its plans until it obtained a permit from the Corps under CWA Section 404.

Obtaining such a permit is a two stage process. First, pursuant to CWA Section 401 the Corps requires an applicant to provide a "State [certification] that the proposed discharge will comply with applicable provisions of State law," including "water quality standards." AR 781. That certification is generally "conclusive with respect to water quality considerations." 33 C.F.R. § 320.4(d). The Illinois EPA issued water quality certifications to SWANCC in November 1989 (AR 772-774) and again in December 1992. AR 6163-6164; *supra*, pp. 6-7.

Second, the Corps makes "an environmental assessment, and a determination of the project's impact on the public interest" (AR 782), weighing in its "public interest" determination such factors as "economics, aesthetics, general environmental concerns, * * * fish and wildlife values, * * * land use, * * * and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a); see *id.* § 320.4(b)-(r). Though the Corps purports to recognize that "primary responsibility for determining zoning and land use matters rests with state [and] local * * * governments," it declines to "accept decisions by such governments" where "there are significant issues" it deems "of overriding national importance" given "the degree of impact in [the] individual case." *Id.* § 320.4(j)(2).

SWANCC submitted a Section 404 permit application in February 1990 seeking to fill 31 acres of trenches and depressions. The Corps concluded that SWANCC's project "is not contrary to the public interest because [its communities] need a solid waste disposal facility" and "the project's reasonably foreseeable benefits outweigh its foreseeable detriments." The Corps nevertheless denied the permit on the grounds that the project did not satisfy guidelines set out at 40 C.F.R. Part 230 because the "site may not be the least damaging practicable alternative site" and the project "would contribute to significant degradation of the aquatic ecosystem." AR 44742.

SWANCC reapplied after significantly amending its proposal, reducing the fill to 17.6 acres and increasing mitigation. *Supra*, p. 5. In July 1994, the Corps denied the permit, now finding the balefill contrary to the public interest and Corps guidelines because (1) breaking up "a large contiguous forest" would cause "unmitigable" impacts to "area sensitive" birds, (2) SWANCC had "not conclusively demonstrated that this is the least environmentally damaging, most practicable alternative," and (3) SWANCC had not "conclusively demonstrated" that it and its member municipalities had "capacity to finance in perpetuity * * * long term maintenance responsibilities," which created an "unacceptable" risk of groundwater contamination. AR 15658-59.[7] The sole basis for jurisdiction stated in the decision was that "the water areas are used as habitat by migratory bird[s] which cross state lines." AR 15578.

G. The Decisions Below

Unable to proceed with its balefill, SWANCC brought this Administrative Procedure Act suit challenging the Corps' decision and the theory under which it asserted jurisdiction. The district court granted summary judgment to the Corps on the issue of jurisdiction. SWANCC dismissed its remaining claims and the court entered final judgment. Pet. App. 2a, 14a.

The Seventh Circuit affirmed. It first rejected SWANCC's argument that basing federal regulatory jurisdiction on migratory birds violates the Commerce Clause, or at least raises enough constitutional problems to mandate a narrower interpretation of "navigable" "waters of the United States." Pet. App. 5a-9a. The court acknowledged that the migratory bird rule can be justified, if at all, only as "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a. It then

[7] The Corps previously had reported to Congress that the balefill would pose "virtually no risk" to groundwater. U.S. Army Corps of Engineers, *Report to Congress on the Impact of a Proposed Municipal Landfill (Balefill) on the Newark Valley Aquifer* 2 (Apr. 1990), AR 38316-38337, 41401 (lodged with the Clerk).

held that although the Corps had made no showing that the use of SWANCC's land by migratory birds had any effect on interstate commerce, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 6a. Finally, the court held that "destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce" because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," including by "trave[l] across state lines." *Id.* at 7a.

Turning to SWANCC's argument that the migratory bird rule is not a permissible interpretation of the CWA, the court held that "the Act reaches as many waters as the Commerce Clause allows." Accordingly, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds," the Corps' interpretation of the Act was "reasonable." Pet. App. 9a-10a.

SUMMARY OF ARGUMENT

The question in this case is whether the U.S. Army Corps of Engineers exceeded the bounds of its authority under the Clean Water Act or the Commerce Clause when it asserted jurisdiction over isolated, intrastate, water-filled trenches and depressions on SWANCC's land solely because those waters were habitat for migratory birds. Under the Corps' interpretation *of the CWA*, its regulatory authority stretches to virtually every body of water in the country—including seasonally wet areas in homeowners' backyards—because virtually any water body is or could be used as a feeding or resting place by some of the five billion birds that migrate over the continental United States each year. Under the Corps' view *of the commerce power*, its jurisdiction could permissibly extend to any activity that might ultimately decrease interstate travel or commercial spending. This outcome cannot be reconciled with the text and history of the CWA or with our constitutional system of enumerated federal powers.

I. The Corps' assertion of jurisdiction over isolated waters on SWANCC's property is not authorized by the CWA. By using the legal terms "navigable waters" and "waters of the United States" in the CWA, Congress invoked their established meanings as waters that are navigable in fact, that could be made navigable with reasonable improvements, or that are connected to such waters and so could affect their quality. This Court has never suggested that those statutory terms encompass waters with *no* physical connection to navigable waters, like the waters regulated under the migratory bird rule. Legislative history confirms that Congress did not intend the Corps to have authority over waters lacking any connection to navigable waters.

The Corps' migratory bird rule is also flatly at odds with three well-settled principles of statutory construction. First, there is serious constitutional doubt about the propriety of the Corps' assertion of jurisdiction over isolated, intrastate waters used by migratory birds. This Court's precedents require that such doubt be avoided by giving the CWA the narrower interpretation supported by its text and history. Second, severe federal intrusion into areas of traditional state and local control, like the Corps' usurpation of local land use and waste management planning here, can only be justified by a clear statement of congressional intent. Not only is such a statement lacking in the CWA, but Congress made explicit in the Act its intention to preserve state and local land use regulation. Third, the rule of lenity weighs in favor of a narrower interpretation of the CWA, which provides for heavy criminal penalties for violations. These familiar interpretative principles—as well as the principle that Congress may not delegate core lawmaking authority to an agency, and the contradictory administrative history of the migratory bird rule—leave no room for *Chevron* deference to the Corps' aggrandizement of its own authority.

II. The Corps' assertion of jurisdiction violates the Commerce Clause. Migratory bird use of isolated intrastate waters has far too attenuated a connection to interstate commerce for jurisdiction to be upheld as regulation of activities that substantially affect interstate commerce. The migratory bird rule is not directed at inherently economic or commercial activity; it does not contain a jurisdictional requirement that limits its application to activities with a real connection to interstate commerce; there are no congressional findings linking waters used by migratory birds to interstate commerce; and the Corps' rationale would justify federal regulation not just of all waters but of virtually all human activity. There is no intelligible principle behind the Corps' bird rule that would not destroy the distinction, crucial to our constitutional order, between what is truly national and what is truly local.

No alternative constitutional basis for the Corps' assertion of Clean Water Act jurisdiction over SWANCC's property exists. But there are ample constitutional bases in the spending, treaty, and property powers for a myriad of federal statutes protecting waters, wetlands, migratory birds, and a host of other environmental values, which would be wholly unaffected by a decision in SWANCC's favor in this case.

ARGUMENT

I. THE CORPS HAS NO AUTHORITY UNDER THE CLEAN WATER ACT TO REGULATE ISOLATED WATERS MERELY BECAUSE THEY PROVIDE HABITAT FOR MIGRATORY BIRDS

The Clean Water Act gives the Corps jurisdiction over "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344, 1362(7). According to the Corps, this language has virtually no meaning and imposes no limits on the Corps' power. The Corps believes that the CWA extends its regulatory authority—and Section 404's mandatory permit requirements—to any water over which Congress could conceivably exercise jurisdiction under the Commerce Clause. That sweeping claim, which the court of appeals uncritically approved, is the only justification the Corps has ever advanced for its migratory bird rule. That rule draws within the Corps' jurisdiction any water at all, no matter how

small or remote, used by any of the five billion birds that migrate across North America every year.

We explain in Part II that even if the CWA could be read to extend the Corps' jurisdiction to the limits of Congress' commerce power, the migratory bird rule is impermissible because it lacks sufficient connection with interstate commerce. It is unnecessary to reach this constitutional question, however, because the CWA does not give the Corps anything like the all-encompassing authority it claims. In asserting jurisdiction over isolated waters because they are used by migratory birds, the Corps has written the term "navigable waters" out of the Act and wrenched Congress' definition of "navigable waters" as "waters of the United States" from those terms' settled meaning. As the legislative history confirms, no plausible reading of the CWA allows the Corps' practically limitless expansion of its own reach through the bird rule.

If there were any doubt that the CWA does not authorize the migratory bird rule, three well-settled principles of statutory construction resolve it. First, whether or not the Corps' interpretation of its jurisdiction violates the Commerce Clause (and it does), it at least raises serious constitutional questions. When there is another permissible reading of a statute, it must be construed to avoid such constitutional doubts. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-575 (1988). Second, the migratory bird rule infringes on a traditional area of state regulation—land use planning and permitting. An explicit statement of congressional intent is required before a statute will be interpreted to effect such a drastic intrusion on traditional state powers. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991). Here, far from making such a statement, Congress expressed its intention to "protect the primary responsibilities and rights of States" over land use. 33 U.S.C. § 1251(b). Finally, the CWA and Section 404 must be construed narrowly in light of the serious criminal penalties for violations of the statute. *Crandon* v. *United States*, 494 U.S. 152, 168 (1990). Absent evidence of congressional intent to apply Section 404 to isolated intrastate

waters based on their use by migratory birds, the Corps' claim of jurisdiction over SWANCC's balefill site must be rejected.

A. The Plain Language Of The CWA Refutes The Corps' Assertion Of Jurisdiction Over Isolated Waters That Are Migratory Bird Habitat

The CWA's jurisdiction-defining terms "navigable waters" and "waters of the United States" do not authorize federal regulation of isolated waters simply because they are habitat for migratory birds.

1. Congress' regulation of navigable waters has a long history. The Northwest Ordinance provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrance * * * shall be common highways." Northwest Ordinance art. IV (1787); see also *Railroad Co.* v. *Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874). Consistent with this understanding of navigable waters as "common highways" of commerce, this Court's early cases held that "navigable waters" are waters "which are navigable in fact," meaning "susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). That standard "applie[d] to all water courses." *Utah* v. *United States*, 403 U.S. 9, 11 (1971). Later decisions expanded the concept of "navigable waters" to include waters that had previously been used in navigation or that could be made navigable in the future through reasonable improvements. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).

Congress' definition of "navigable waters" as "waters of the United States" (33 U.S.C. § 1362(7)) does not sever, but rather strengthens, the link between the Corps' jurisdiction and the concept of navigability. The phrase "navigable waters of the United States," as distinguished from "waters of the States," has long been used to mean waters over which interstate commerce may pass. *Donnelly* v. *United States*, 228 U.S. 243, 262 (1913) ("what are navigable waters of the United States" depends on whether the water "affords a channel for useful commerce"); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870)

(a river that "is not of itself a highway for commerce with other States or foreign countries, or does not form such a highway by its connection with other waters * * * is not a navigable water of the United States"); *The Daniel Ball*, 77 U.S. at 563; *Leovy* v. *United States*, 177 U.S. 621, 632 (1900); *Perry* v. *Haines*, 191 U.S. 17, 28 (1903). Though the Act uses the phrase "waters of the United States" rather than "navigable waters of the United States," that phrase is used to *define* the term "navigable waters." In the Act as in this Court's cases, "navigable waters" and "waters of the United States" remain closely intertwined.

The statutory terms "navigable waters" and "waters of the United States" must be understood against this legal backdrop. This Court "assume[s] that when a statute uses" a legal term of art, Congress' choice is not haphazard or insignificant; rather, "Congress intended [the term] to have its established meaning" (*McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991)) and to "adopt the interpretation placed on that concept by the courts." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989); see also *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979); *The Abbotsford*, 98 U.S. (8 Otto) 440, 444 (1878). The jurisdictional terms Congress used in the CWA carry at their core the meaning established by this Court's decisions: waters that are navigable in fact, have been navigable, or could be made navigable with reasonable improvements.

2. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), casts no doubt on this plain meaning of the CWA's jurisdictional terms. This Court did state in *Riverside Bayview* that "the term 'navigable' as used in the Act is of limited import"—but only in the sense that Congress meant to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. The Court merely recognized that Congress did not use the terms "navigable waters" and "waters of the United States" in the classic *Daniel Ball* sense requiring navigability in fact.

In *Riverside Bayview*, the Court upheld a limited extension of federal regulatory jurisdiction to reach wetlands that,

because of their proximity and function, "are inseparably bound up with the 'waters' of the United States" to which they are "adjacent." 474 U.S. at 134; see *ibid.* ("wetlands may affect the water quality of adjacent lakes, rivers, and streams"). This Court's holding that "a wetland that actually abuts on a navigable waterway" (*id.* at 135) is within the scope of the CWA does *not* mean that an isolated pond with no connection to any navigable waterway is covered. The Court expressly declined to hold that the Corps may exercise jurisdiction over "wetlands that are not adjacent to bodies of open water." *Id.* at 131 n.8, 135.

3. The Corps defends its migratory bird rule as consistent with the CWA by arguing that the statute defines the term "navigable waters" "without qualification" as "the waters of the United States." Thus, "[b]ecause the CWA does not further define the term 'waters of the United States,'" the Corps believes that its interpretation of that term to reach all waters within Congress' commerce power is entitled to deference. Br. in Opp. 13-15 & n.9. That argument is without merit, and not just because, as we show in Part II, the bird rule lies outside the commerce power. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199 (1974) (rejecting argument that "facially narrow" statutory language was intended "to manifest the full degree of [Congress'] commerce power").

It is not permissible for the Corps to read the term "navigable waters" out of CWA Section 404 by looking only to that term's statutory definition as "the waters of the United States." The Corps' interpretation violates the cardinal principle that statutes "must, if possible, be construed in such fashion that every word"—including "navigable" in the CWA—has "operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); see *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Jones* v. *United States*, 120 S. Ct. 1904, 1911 (2000) (rejecting reading under which the statute's "limiting language * * * would have no office").

It is also unreasonable to suppose that a defined term and defining term bear no relationship and that the former loses all meaning, totally subsumed in the latter. See *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 503-504 (1945) (rejecting contention that a statutory definition of the term "produced" to mean "handled, or in any other manner worked on" encompassed "not only handling or working on in relation to producing," but also other "handling or working on"). It would be particularly surprising if the concept of *navigability* disappeared altogether when Congress defined "navigable waters" as "the waters of the United States," given that navigability is a traditional jurisdictional concept with a settled meaning in this Court's jurisprudence. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1301 (2000) ("'Ambiguity is a creature not of definitional possibilities but of statutory context'"). As the Fourth Circuit held in *United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), "as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters."

The Corps' contention that it is free to interpret the term "waters of the United States" to reach all waters within the commerce power also cannot be squared with the principle that Congress is presumed to intend the established legal meaning of terms it uses. *Supra*, p. 16. Congress did not say "waters *in* the United States subject to the commerce power" but "waters *of* the United States," which have always been those waters that "affor[d] a channel for useful commerce" between the States. *Donnelly*, 228 U.S. at 262. Even if that traditional meaning may be stretched, in combination with a broad understanding of "navigable waters," to reach most rivers, streams, and lakes, and waters and wetlands closely related to them, it cannot

conceivably apply to the completely isolated, water-filled mining trenches on SWANCC's land.[8]

4. The Corps erroneously contends that its migratory bird rule is permissible in light of the CWA's purposes to "restore and maintain the * * * biological integrity of the Nation's waters" and provide "for the protection and propagation of * * * wildlife." 33 U.S.C. 1251(a). A statute's general purpose cannot override jurisdictional terms like "navigable waters" and "waters of the United States" that had a settled legal meaning when Congress used them. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("vague notions of a statute's 'basic purpose'" are "inadequate to overcome the words of its text regarding the *specific* issue under consideration"); *Federal Reserve Bd.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986). Nor can the Corps' vast extension of its jurisdiction to cover countless millions of isolated intrastate waters be reconciled with Congress' express policy in the CWA "to recognize, preserve, and protect the primary responsibilities and rights of States" to "plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b); see *infra*, Part I.C.2.

The Corps attaches misplaced significance to this Court's reference in *Riverside Bayview* to the agency's view that "*adjacent wetlands* may 'serve significant natural biological functions'" and are "integral parts of the aquatic environment." 474 U.S. at 134-135 (emphasis added). That was but one (and the least direct) of the connections the Corps said existed between wetlands and adjacent navigable waters. Of greater importance was the fact "that wetlands may serve to filter and purify water draining into adjacent bodies of water" and "slow

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[8] The structure of the CWA also demonstrates the error of the Corps' interpretation. The Act forbids discharge of pollutants into three categories of water: "navigable waters," "waters of the contiguous zone," and "the ocean." 33 U.S.C. §§ 1311, 1362(12). If the term "navigable waters" encompasses all waters subject to federal jurisdiction, there would have been no need separately to prohibit discharges into these other waters. See also 33 U.S.C. § 1343.

the flow of surface runoff into lakes, rivers, and streams," thereby affecting the quality of navigable waters. *Id.* at 134.

Thus, *Riverside Bayview* did *not* endorse the Corps' interpretation of the CWA to reach isolated waters that have *no* connection to navigable waters except that they are habitat for migratory birds (which could at some point alight, feed, or live on virtually any body of water, however insubstantial or evanescent). As Judge Manion has pointed out, the CWA "is not a comprehensive wildlife protection statute. Although the Act mentions wildlife as an important result of controlling pollution, the purpose of the Act is to restore and maintain clean water." *Hoffman Homes, Inc.* v. *EPA*, 961 F.2d 1310, 1322 (7th Cir. 1992), vacated, 975 F.2d 1554, adopted, 999 F.2d 256, 262 (7th Cir. 1993) (Manion, J., concurring). Nothing in *Riverside Bayview* suggests that a potential wildlife connection with navigable waters is enough to bring isolated ponds within the CWA. If such a connection were sufficient, any minuscule body of water capable of attracting a migrating duck or other visiting wildfowl would be subject to federal powers that supersede state environmental regulation. *Riverside Bayview* did not suggest that this limitless basis for federal jurisdiction could be reconciled with the interpretative principles we discuss in Part I.C or with the Constitution.

This Court's opinion in *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90 (1965), is instructive. The Federal Power Act imposes requirements on water projects on "navigable waters of the United States" *and* other waters "over which Congress has jurisdiction under its authority to regulate commerce." 16 U.S.C. § 817. In *Union Electric*, the Court noted that this language does not apply to "projects located on intrastate nonnavigable waters which do not flow into any navigable streams." 381 U.S. at 96-97 & n.9. The CWA's statutory language is *more* limited and so must at least exempt "intrastate nonnavigable waters," like those on SWANCC's property, that are neither connected nor closely related to navigable water.

B. Legislative History Confirms That The CWA Does Not Reach Isolated Waters That Are Migratory Bird Habitat

Legislative history confirms that the CWA does not authorize the migratory bird rule.

1. The original Senate bill defined "navigable waters" as "*the navigable waters* of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." S. 2770, 92d Cong. § 502(h) (1971) (emphasis added). The House bill defined "navigable waters" as the "*navigable waters* of the United States, including the territorial seas." H.R. 11896, 92d Cong. § 502(8) (1972) (emphasis added). Reconciling these differences, the Conference Committee adopted the current language defining "navigable waters" as "waters of the United States, including the territorial seas." The Conference Report does not explain the effect of this change. It merely states that "[t]he conferees fully intend that *the term 'navigable waters'* be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. CONF. REP. NO. 92-1236, at 144 (1972) (emphasis added); see also H.R. REP. NO. 92-911, at 131 (1972) (similar commentary on original House bill).

The Corps places enormous weight on this single sentence. But the conferees did not mean that the CWA gives the Corps the maximum constitutional authority over *waters*. If Congress had intended to regulate all *waters* within its commerce power it knew how to say so. See 33 U.S.C. § 817(1) (reaching nonnavigable waters "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States"); see also *Jones*, 120 S. Ct. at 1909 (the unqualified "statutory term 'affecting * * * commerce' * * * signal[s] Congress' intent to invoke its full authority under the Commerce Clause").

Rather, the Conference Report reflects Congress' intent to enact a broad definition *of the term "navigable waters."*

Nothing suggests that Congress intended the CWA's jurisdictional language to be interpreted so that "waters of the United States" no longer acts, in any meaningful sense, as a definition of "*navigable* waters." To the contrary, the legislative history demonstrates that Congress understood that the Corps' jurisdiction would be limited to waters bearing a significant relationship to navigable waters and the carriage of interstate commerce. Thus, Senator Muskie, Senate floor manager for the conference bill, gave this explanation in terms very like those used by this Court in its prior cases:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Committee on Public Works by the Library of Congress), Ser. No. 93-1, at 178 (1973) ("Leg. Hist."); see *id.* at 163-164.

In the House, Representative Dingell explained that the new definition was broader than "'navigable waters of the United States' in the technical sense as we sometimes see in some laws." 1 Leg. Hist. at 250. The statute is "in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the *Daniel Ball* [navigable-in-fact test]—to include waterways which would be 'susceptible of being used * * * with reasonable improvement,' as well as those waterways which include sections presently

obstructed by falls, rapids, sand bars, currents, floating debris." *Ibid.* Under the new definition, "it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways." *Ibid.*, citing *Utah*, 403 U.S. at 11 ("The lake was used as a highway and that is the gist of the federal test").

As Senator Muskie and Representative Dingell spelled out, while "[n]avigable waters" means more than waters navigable in fact, it still requires that waters be part of or closely related to "waters of the United States" as this Court has always understood that term to mean a link in the "highways" of interstate commerce. The congressional understanding of the statute is inconsistent with the Corps' migratory bird rule.

Just as telling is what the legislative history does *not* say. If the CWA had the sweep that the Corps contends, it would require citizens (including ordinary homeowners whose backyards are visited by ducks after heavy rains) to seek Section 404 permits before altering almost any small, isolated pond or wetland.[9] Yet there is not one word of this in the legislative history. One is "struck by what Congress did not say. * * * Congress would certainly recognize" the consequences of extending Section 404 to so many areas of American life—not the least of which is a dramatic "alter[ation of] sensitive federal-state relationships"; "the fact that they are not even discussed in the legislative history * * * strongly suggests that Congress did not intend" "navigable waters" to be read so broadly. *Rewis* v. *United States*, 401 U.S. 808, 811 (1971).

2. The Corps relies on legislative history of 1977 amendments to the CWA, in particular, Congress' failure to enact a

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[9] The Corps claims jurisdiction over filling "waters of the United States" for "construction or expansion of a single-family home" used as "a personal residence," or for "attendant features" like a "garage, driveway, storage shed," or "yard"). 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999); 61 Fed. Reg. 65,874, 65,898 (Dec. 13, 1996).

proposal to limit the Corps' jurisdiction to wates navigable in fact or capable of being made navigable. Even if this history helped the Corps—which it does not—it is of little relevance. "[T]he intent of Congress must be culled from the events surrounding passage" of disputed provisions in 1972; "[o]pinions attributed to a Congress [five] years after the event cannot be considered evidence of the intent of the Congess in [1972]." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963); see also *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 265 (1945) (Congress' "failure in 1939 and 194) to adopt an amendment * * * cannot operate retroactively ** * to give the statute enacted in 1938 a different meaning"); *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S 102, 118 n.13 (1980). Because "textual and contemporaneous evidence" is "clear," "the subsequent legislative record" cannot alter the natural reading of the CWA, which forbids the bird rule. *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994).

Upholding the Corps' interpretation of "navigable waters" to reach wetlands *adjacent* to navigable wates in *Riverside Bayview*, this Court did deem it relevant that "the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress [in 1977] rejected measures designed to curb the Corps' jurisdiction." 474 U.S. at 137. No analogous argument supports the bird rule, which *was not announced until 1986 and was based on a 1985 EPA memorandum*. See *infra*, Part I.D.3.

The Corps issued regulations in the middle of Congress' consideration of the CWA amendments that purported to cover isolated waters that are "part of a chain or connection to the production, movement, and/or use of interstate commerce." 42 Fed. Reg. 37,122, 37,127 (July 19, 1977); *id.* at 37,144. The notion that migratory bird use could draw a pond into that category would have astounded Congress. No one in 1977 so much as mentioned migratory birds as a basis for Corps jurisdiction. Nor did Congress defeat any proposal "designed to supplant" that basis for jurisdiction. *Riverside Bayview*, 474 U.S. at 137.

In fact, it cannot be inferred that Congress in 1977 acquiesced in *any* Corps jurisdiction over isolated, non-adjacent waters. There was agreement among legislators that the Corps exceeded its jurisdiction when it issued a press release in 1975 (later repudiated) claiming that Section 404 permits might be required to enlarge stock ponds, deepen irrigation ditches, and fight stream erosion.[10] The debate in Congress was not about whether, but how, to curb this overreaching. Many in Congress supported a House bill confirming that "navigable waters" are navigable in fact or that could be made so by improvement. H.R. 3199, 95th Cong. § 16 (1977).[11] Others, however, were concerned that the House bill went too far. In light of Congress' desire to ensure that the Corps retained authority over "small streams, marshes, wetlands, and swamps *which will make their way into the bigger waterways of the this country,*" even though these waters were not and could not reasonably be made navigable in fact, Congress adopted a compromise that exempted activities such as "normal farming [and] ranching activities" from Section 404 and authorized the Corps to issue general permits for categories of activities. 4 Leg. Hist. 1977 at

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[10] *E.g.*, 4 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. 95-14, at 1248-1249 (1978) ("Leg. Hist. 1977") (Reps. Edgar and Myers) (press release "made very dubious analyses of the section 404 program"); *id.* at 1350 (Rep. Cleveland) (complaining of "all the idiocies that came out the early Corps of Engineers announcements"); *id.* at 948 (Sen. Muskie) ("The Corps proceeded to take [Section 404] and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over").

[11] *E.g.* 4 Leg. Hist. 1977 at 905 (Sen. Bentsen), 924 (Sen. Domenici), 933 (Sen. Dole), 940 (Sen. Hansen), 1290 (Rep. Hagedorn), 1323-24 (Rep. Alexander), 1344 (Rep. Hammerschmidt), 1345 (Rep. Breaux), 1346 (Rep. Smith), 1396-1397 (Rep. McKay).

908 (Sen. Hart) (emphasis added); see Pub. L. No. 95-217 § 67, 91 Stat. 1566, 1600-1606 (1977).

Nothing in this history suggests that Congress acquiesced in the Corps' regulation of isolated water bodies that could in no way affect the quality of navigable waters. No bill stating that such waters were outside the Corps' authority came before Congress and none was defeated. That Congress did not adopt the much more aggressive House bill tells us nothing about Congress' views regarding federal authority over wholly isolated waters. "It is impossible to assert with any degree of assurance that congressional failure" to adopt the House bill "represents congressional approval of" the Corps' 1977 interpretation of the CWA to reach isolated waters (42 Fed. Reg. at 37,127), much less the bird rule that was not published until nine years later. *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 186 (1994).

C. Settled Rules Of Statutory Construction Resolve Any Doubts Against The Migratory Bird Rule

Even if the text and legislative history of the CWA did not so clearly forbid the Corps' extravagant assertion of jurisdiction over SWANCC's isolated, water-filled mining trenches based on their use by migratory birds, well established canons of statutory interpretation resolve any doubt against that expansion of federal power.

1. "'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter.'" *Jones*, 120 S. Ct. at 1911. This is a "cardinal principle," "beyond debate." *DeBartolo*, 485 U.S. at 575. Because it reflects the "prudential concern that constitutional issues not be needlessly confronted" (*ibid.*), it applies not only where an interpretation clearly would be unconstitutional, but also where an interpretation would raise serious questions about a statute's validity. *Jones*, 120 S. Ct. at 1911-1912; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *United States* v. *Jin Fuey Moy*, 241 U.S.

394, 401 (1916); see also *Jones* v. *United States*, 526 U.S. 227, 251 n.11 (1999) (in rejecting a constitutionally doubtful interpretation this Court does "not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns").

The principle that constitutional doubts must be avoided applies with full force when the challenged interpretation is embodied in an administrative regulation. See *DeBartolo*, 485 U.S. at 575; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979). Only the "'clearest indication'" of Congressional intent overcomes the presumption against an administrative interpretation of questionable constitutionality. *DeBartolo*, 485 U.S. at 577; see also *United States* v. *Five Gambling Devices*, 346 U.S. 441, 450 (1953) (plurality) (requiring "unmistakable intention of Congress to raise the constitutional questions" implicated by a broad construction).

We show in Part II that predicating jurisdiction over isolated waters on their use by migratory birds violates the Commerce Clause. But whether or not the migratory bird rule is actually unconstitutional, it at least "raises serious and important constitutional questions." *Cargill, Inc.* v. *United States*, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting from denial of certiorari). Even *defenders* of the rule concede that it "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir. 1995). Given the absence of clear evidence that Congress intended the Corps to regulate isolated waters simply because migratory birds use them, the "serious [constitutional] doubts about the propriety of the Corps' assertion of jurisdiction" require rejection of this interpretation. *Cargill*, 516 U.S. at 958 (Thomas, J.); see *Leovy*, 177 U.S. at 633 (if the term "navigable water of United States" swept so broadly that "scarcely a creek or stream in the entire country" would be excluded, then the statute's "validity might well be questioned"); *Wilson*, 133 F.3d at 257 ("Absent a clear indication to the contrary, we should not lightly presume" that

"Congress authorized the [Corps] to assert its jurisdiction in such a sweeping and constitutionally troubling manner").

2. A second, equally fundamental, rule of statutory construction is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (a statute will not be read to "displace traditional state regulation" unless "the federal statutory purpose [is] 'clear and manifest'"); *Gregory*, 501 U.S. at 460-461; *Palmer* v. *Massachusetts*, 308 U.S. 79, 84 (1939); *Rewis*, 401 U.S. at 811-812. That principle precludes reading the CWA to displace state and local authority over isolated waters merely because migratory birds alight on them.

a. The CWA reflects traditional views of the division of regulatory authority over waters. "Navigable" "waters of the United States," which are part of or connected to water highways of interstate commerce, are regulated by the federal government. At the same time, Congress "recognize[d]" and sought to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b). The Corps' bird rule, by extending "waters of the United States" to wholly isolated, intrastate waters just because they are used by migratory birds, readjusts this balance between state and federal authority without *any* warrant in the text or history of the CWA—let alone the "clear and manifest" statement that this Court requires—and in plain contradiction of 33 U.S.C. 1251(b).

Given its "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" (*United States* v. *Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring)), this Court should not

countenance the Corps' assault on local jurisdiction over tens of millions of acres. This Court has long recognized "the authority of state and local governments to engage in land use planning." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)). Indeed, regulation of land use and zoning "is perhaps the quintessential state activity" (*FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982)), and has been "traditionally performed by local governments." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); see also *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) ("The regulation of land use is traditionally a function performed by local governments"); *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975) ("zoning laws and their provisions * * * are peculiarly within the province of state and local legislative authorities"). Under the migratory bird rule, the Corps acts as a sort of super zoning board or land use authority over vast amounts of land containing isolated ponds used by migratory birds—able to bar projects that have been approved by state and local authorities (like SWANCC's balefill) based on the Corps' view that they do not comport with the "public interest." 33 C.F.R. § 320.4(a). "An inroad upon [matters heretofore traditionally left to local custom or local law] of such far-reaching import as is involved here, ought to await a clearer mandate from Congress." *FTC* v. *Bunte Bros.*, 312 U.S. 349, 354 (1941).

b. Not only do States and their subdivisions have general authority over land use, but they have also paid considerable attention to water resources and wetlands conservation. Disproving predictions of a "race to the bottom," state governments have acted as leaders in environmental regulation and would doubtless be more active still had the federal government not asserted authority in this area. See Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 47-48 (1999); National Governors' Association, *Policy NR-3, Water Resource Management*, <http://www.nga.org.pubs/policies/nr/nr03.asp> (visited July 18, 2000).

Illinois has had a long-standing commitment to protecting water resources. Since 1970, the Illinois Constitution has required the state "to provide and maintain a healthful environment." ILL. CONST. art. XI, § 1. Illinois "was one of the first states to enact a comprehensive system of environmental statutes and regulations" (Bullwinkel, *Environmental Law—The Uneasy Accommodation Between State and Federal Agencies*, 25 DEPAUL L. REV. 423, 423 (1976)), and has been recognized as being "in the forefront of water pollution control." Ginsberg & Harsch, *The National Pollutant Discharge Elimination System in Illinois: The State Assumes Direct Authority*, 27 DEPAUL L. REV. 739, 745 (1978). By the time Congress passed the CWA, Illinois "already had sophisticated water pollution control programs" (*id.* at 746) and had established state institutions tasked with pollution control. Bullwinkel, 25 DEPAUL L. REV. at 423. Illinois has since enacted laws charging state agencies with protection of wetlands and groundwater, and with overseeing solid waste management projects like SWANCC's. *E.g.*, Interagency Wetland Policy Act, 20 ILCS 830/1; Illinois Groundwater Protection Act, 415 ILCS 55/1; Illinois Solid Waste Management Act, 415 ILCS 20/1.

"State officials," moreover, "have better knowledge of local environmental concerns than federal officials ever could." Adler, 29 ENVTL. L. at 52. Because Illinois, like other states, has in place a comprehensive scheme for protecting local water resources, the Corps' oversight over the isolated waters on SWANCC's property is unnecessary from a conservation standpoint and objectionably intrusive into a well-functioning state regulatory scheme. Worse, solid waste disposal planning requires that state and local agencies overcome substantial "NIMBY" obstacles. See *supra*, p. 3 n.2; Adler, 29 ENVTL. L. at 67 n.346. In this politically sensitive area—where it is very difficult to secure approval for any project—imposing an additional federal level of regulation is especially burdensome and harmful. SWANCC's state-approved balefill plan is the product of a long and costly search for a solution to a local problem. If Congress intends to authorize the Corps to use

Section 404 to effect virtual federal occupation of this field, which is the practical effect of the bird rule, it must say so.

3. The CWA is a criminal as well as civil statute. A violation carries fines up to $100,000 per day and six years imprisonment. 33 U.S.C. § 1319(c)(2). Even a *negligent* violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under the Corps' interpretation, anyone—including a homeowner—who discharges fill material into an isolated, intrastate pond, negligently failing to realize that it is (or could be) a migratory bird habitat, commits a criminal offense.

Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. These rules apply in civil cases to statutory provisions, like Section 404, that have both criminal and civil consequences. As this Court explained in a civil case concerning "a tax statute [with] criminal applications," the rule of lenity "is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality); *id.* at 519 (Scalia and Thomas, JJ., concurring); see also *Crandon*, 494 U.S. at 158.[12]

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[12] *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 n.18 (1995), where this Court declined to apply the rule of lenity to a "facial challeng[e] to administrative regulations" on the ground that principles of fair warning were not implicated when a clear regulation had "existed for two decades," is easily distinguished. This case involves an as-applied, not a facial challenge. The basis on which the Corps asserted jurisdiction over SWANCC's property was a brief statement that appeared in the Federal Register as a preamble to a regulation, never in the Code of Federal Regulations. And the bird rule was applied to SWANCC only one year after it was first formulated by the Corps.

"[T]ext, structure, and history" do not establish that the migratory bird rule is an "unambiguously correct" interpretation of the CWA. *Granderson* v. *United States*, 511 U.S. 39, 54 (1994). The rules of lenity and strict construction therefore require that this basis for federal jurisdiction be rejected. See *Jones*, 120 S. Ct. at 1912.

D. The Corps' Expansion Of Its Power To Reach Migratory Bird Habitat Is Not Entitled To Deference

The Corps' interpretation of Section 404 to cover isolated water-filled depressions used by migratory birds is not entitled to the judicial deference accorded reasonable agency interpretations of ambiguous statutory language. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1. The CWA's jurisdictional terms "navigable waters" and "waters of the United States" are *not* ambiguous when read in light of settled meanings established in this Court's decisions and do not authorize the migratory bird rule. *Supra*, Part I.A. The CWA's legislative history confirms that Congress adopted those judicial definitions. *Supra*, Part I.B. And three established principles of statutory interpretation condemn the Corps' reliance on migratory birds to establish jurisdiction over isolated waters. *Supra*, Part I.C. A court will "defer to [an agency's] interpretation of a statute only after 'employing traditional tools of statutory construction.'" *Sullivan* v. *Everhart*, 494 U.S. 83, 103 (1990); see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998). Applicable rules of construction eliminate any ambiguity in this case and leave nothing to be resolved through application of *Chevron* principles.[13]

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[13] Courts routinely hold that *Chevron* deference is inappropriate when an agency's statutory interpretation raises serious constitutional doubt. *E.g.*, *U.S. West, Inc.* v. *FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999); *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995); see *GTE Service Corp.* v. *FCC*, No. 99-1244 (cert. granted June 5, 2000) (presenting question whether deference is owed to an agency interpretation that raises questions under the Takings Clause).

2. The Corps' claim to deference raises serious problems of delegation of lawmaking authority. Whether or not Congress constitutionally could have enacted the migratory bird rule, it did not do so. Congress chose instead to regulate pollution of "navigable" "waters of the United States" based on the view that polluting those waters had a sufficient effect on interstate commerce to support federal jurisdiction. In so doing, Congress defined the type of connection to interstate commerce that would justify application of the CWA.

The Corps ignores that congressional determination in its bird rule, which relies on a *different* alleged connection to interstate commerce as its constitutional basis. In essence, the Corps claims authority to determine whether it is "necessary and proper" to regulate intrastate ponds used by migratory birds in order to protect interstate commerce. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 231-232 & n.11 (1948); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-585 (1985) (O'Connor, J., dissenting); 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-814 & n.23 (3d ed. 2000). But Congress focused on human navigation, not the episodic migration of waterfowl.

"The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress.'" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976); see *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 583, 613-614 (1983) (O'Connor, J., concurring). There is *no* evidence that Congress delegated to the Corps its full constitutional authority, under the Commerce and Necessary and Proper Clauses, to determine

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There is also substantial doubt whether deference is due to an agency's interpretation of the scope of its own jurisdiction. See *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) (agency may not invoke discretion to "bootstrap itself into an area in which it has no jurisdiction").

whether a class of intrastate waters is sufficiently related to interstate commerce to fall within federal control. See *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) ("Congress generally cannot delegate its legislative power to another Branch"). This Court should not presume that Congress intended such a sweeping and constitutionally questionable delegation. See *United States* v. *George*, 228 U.S. 14, 21 (1913) (refusing to interpret statute to "confer unbounded legislative powers").

3. Finally, the strange and contradictory history of the migratory bird rule should give pause before deferring to this limitless extension of the Corps' jurisdiction. Following passage of the CWA in 1972, the Corps' took the position that the Act preserved its jurisdiction under the River and Harbor Act of 1899 over waters that are tidal or that are "presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,050, 12,119 (Apr. 3, 1974). In 1975 a district court issued a one-page opinion holding that the CWA "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause" and was "not limited [by] traditional tests of navigability." *NRDC* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

Rather than appeal, the Corps issued interim regulations expanding Section 404 permit requirements to "[i]ntrastate lakes [larger than 5 acres], rivers and streams" if they were used in specified ways relating to interstate commerce. 40 Fed. Reg. 31,319, 31,324-25 (July 25,1975). The Corps never suggested that this provision, or a catch-all provision applying to "other waters which the District Engineer determines necessitate regulation" (*ibid.*), made it necessary to secure a permit to fill isolated waters that serve as migratory bird habitat.

The Corps issued new regulations in 1977 that redefined "waters of the United States" to include "[a]ll other waters of the United States * * *, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of

which could affect interstate commerce." 42 Fed. Reg. at 37,144. The Corps asserted in a footnote that this rule encompassed all "waters of United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious." *Id.* at 37,144 n.2. Nowhere did the 1977 regulations even hint that migratory birds were a basis for jurisdiction.

Years later, in 1985, Corps personnel testified to a Senate Committee that the Corps "does accept the notion that migratory waterfowl does constitute a nexus with interstate commerce." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 99th Cong. 168 (1985); *id.* at 190. In response to a Senator's inquiry, EPA prepared a memorandum claiming jurisdiction over all waters that "'are used or would be used' by migratory birds." Memorandum from F. Blake to R. Sanderson (Sept. 12, 1985). Relying on this, the Corps included its bird rule in the *preamble* to a 1986 revision of its regulations—14 years after passage of the CWA. 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986).[14]

The Corps' lengthy delay in "realizing" that Section 404's mandatory requirements apply to isolated ponds used by migratory birds—as well as its about-face from its contemporaneous

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[14] The Corps did not promulgate the bird rule in accordance with Section 553 of the Administrative Procedure Act, so it has never been subject to notice and comment. In *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (mem.), the rule was invalidated for that reason. Nevertheless, the Corps and EPA take the position that "notwithstanding * * * *Tabb Lakes*, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as habitat for migratory birds." GUIDANCE FOR CORPS AND EPA FIELD OFFICES REGARDING CLEAN WATER ACT SECTION 404 JURISDICTION OVER ISOLATED WATERS IN LIGHT OF UNITED STATES V. JAMES J. WILSON, at 6 n.3 (May 29, 1998).

interpretation—undercut its claim to deference. *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 130 (1983); *Aluminum Co.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984). In addition, agency interpretations promulgated without notice and comment or other formal procedures, like the bird rule, "do not warrant *Chevron*-style deference," but are only entitled to any respect commanded by their "'power to persuade.'" *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662-1663 (2000); see *Reno* v. *Koray*, 515 U.S. 50, 61 (1995); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256-258 (1991). Given the Corps' failure to come to grips with statutory language, interpretative principles requiring a narrow construction, or constitutional limitations, no such respect is due here.

II. THE CORPS MAY NOT CONSTITUTIONALLY REGULATE ISOLATED WATERS MERELY BECAUSE THEY PROVIDE HABITAT FOR MIGRATORY BIRDS

If this Court concludes that the CWA permits the Corps to regulate any waters used as habitat by migratory birds, then it must consider whether the Corps' migratory bird rule is constitutional. It is not.

A. Regulation Of Isolated Waters Used By Migratory Birds May Not Be Upheld As Regulation Of "Activities That Substantially Affect Interstate Commerce"

Congress' power under the Commerce Clause extends to "'three broad categories of activity'" (*United States* v. *Morrison*, 120 S. Ct. 1740, 1749 (2000)): (1) "the use of the channels of interstate commerce," which permits Congress to exclude harmful uses and products from those channels; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," which "Congress is empowered to regulate and protect"; and (3) "those activities having a substantial relation to interstate commerce, * * * *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-559.

As the court below recognized, and the Corps apparently concedes (Br. in Opp. 17), the migratory bird rule "could only have been sustained as an exercise of the third variety of regulatory power," over activities that substantially affect interstate commerce. Pet. App. 6a. But the Corps has not shown *any* discernible effect on interstate commerce, much less a substantial one, caused by filling isolated ponds on SWANCC's property. See Pet. App. 6a, 20a. The sole basis for federal authority that the Corps relies on—which was also the sole basis relied on by the court below (Pet. App. 7a)—is the cumulative effect of "[t]he filling of wetlands and similar aquatic areas that serve as migratory bird habitat [on] the ability of people to pursue recreational and commercial activities associated with migratory birds." Br. in Opp. 19. Applying the four factors considered by this Court in finding the Gun-Free School Zones Act ("GFSZA") and Violence Against Women Act ("VAWA") to be outside the commerce power, it is clear that the Corps has failed to show a sufficient relation between interstate commerce and migratory bird use of isolated waters to support federal regulation.

1. As this Court emphasized in *Lopez* and *Morrison*, Congress' power under the Commerce Clause is centered on just that—commerce. "[T]hus far in our Nation's history," the Court stressed, "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751.

Like GFSZA and VAWA, the migratory bird rule prohibits activities that are not inherently economic or commercial: adding any "pollutant" (including fill material) into any "navigable water" that is an actual or potential habitat for migratory birds, without a permit. It applies equally to a private homeowner who landscapes the backyard, fills a damp patch to prevent mosquitos, or builds a storage shed (see *supra*, p. 23 n.9), and to a commercial developer who bulldozes a marsh. The Corps has even taken the position that the migratory bird rule regulates "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland," all of which might "'degrade' the

wetland within the meaning of this rule." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993).[15] Permit applications have involved wetlands as small as 26 square feet, or about half the size of a ping-pong table. V. ALBRECHT & B. GOODE, WETLAND REGULATION IN THE REAL WORLD 21 (1994). Obviously, many of the activities covered by the rule are not "commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 414, 417-418 (1998) (the bird rule is "indefensible" as regulation of commerce "under any untortured definition of the word"). The aggregation theory may not, therefore, be used to find a substantial effect on interstate commerce warranting federal power. *Morrison*, 120 S. Ct. at 1749-1750; *Lopez*, 514 U.S. at 559-561.

The Corps contends that the migratory bird rule is nonetheless permissible because prevention of harm to migratory birds "has long been recognized to be a matter of national concern." Br. in Opp. 18. But characterizing something as of "national concern" does not make it a proper subject for federal regulation despite its noncommercial character. Few would doubt that spousal abuse and the impact of gun-related violence on education are of "national concern," as are the high divorce rate, urban crime, and early childhood education. Nonetheless, the commerce power does not encompass VAWA or GFSZA, any more than it permits plenary regulation of divorce, crime, or public elementary schools. *Morrison*, 120 S. Ct. at 1752-

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[15] Applying a "de minimis exception," the Corps has sometimes exercised its discretion not to regulate this type of activity so long as its adverse effects are minimal. 58 Fed. Reg. at 45,020. The Corps and EPA have emphasized, however, that "the threshold of adverse effects for the de minimis exception is a very low one" and that activities need not cause significant impairment or degradation of a wetland in order to fall under the migratory bird rule. *Ibid.*

1753; *Lopez*, 514 U.S. at 564. The last time we checked, there was no "national concern" clause in the Constitution.

None of the cases the government has relied on supports its argument that the Commerce Clause permits regulation of noncommercial conduct that might, in the aggregate, indirectly affect commerce related to migratory birds. Two of those cases involve Congress' authority to protect migratory birds under *different* provisions of the Constitution—the Treaty Clause and the Spending Clause. *North Dakota* v. *United States*, 460 U.S. 300, 309-310 (1983) (spending power); *Missouri* v. *Holland*, 252 U.S. 416, 431-432 (1920) (treaty power). The third involved a ban on *commercial* transactions in wildlife. *Andrus* v. *Allard*, 444 U.S. 51, 54 (1979). We do not dispute that the Commerce Clause permits Congress to regulate commercial transactions in animals. See *Lopez*, 514 U.S. at 573-574 (Kennedy, J., concurring); *Douglas* v. *Seacoast Prods.*, 431 U.S. 265, 281-282 (1977). That principle does nothing, however, to further the Corp's claim of authority over waters just because they are used by migratory birds. See *Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari).

2. The second factor emphasized by this Court in holding GFSZA and VAWA outside the scope of the commerce power was the absence of an "express jurisdictional element" limiting the statute's reach to conduct having "an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562; *Morrison*, 120 S. Ct. at 1750-1751. The migratory bird rule likewise lacks any jurisdictional element that narrows its application to constitutional limits.

3. The third factor relied on in *Lopez* was the lack of any congressional findings regarding the effects on interstate commerce of the regulated conduct. 514 U.S. at 562; see also *Morrison*, 120 S. Ct. at 1751. It is readily apparent from the CWA's legislative history that Congress never even considered the possibility of regulating small ponds that are habitat for migratory birds. Unsurprisingly, therefore, Congress made no findings that discharge of pollutants into the habitat of migratory birds has a substantial effect on interstate commerce.

The principle that the government may regulate activity with only a *de minimis* connection to interstate commerce rests on the assumption that Congress has declared that the "entire class of activities affects commerce." *Maryland* v. *Wirtz*, 392 U.S. 183, 192 (1968); see *Perez* v. *United States*, 402 U.S. 146, 154 (1971); *United States* v. *Darby*, 312 U.S. 100, 120-121 (1941). Deference is appropriate because it is Congress' role, under the Constitution, to select the means necessary and appropriate to protect interstate commerce. *Five Gambling Devices*, 346 U.S. at 449 (plurality); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 419-420, 423-424 (1819); see Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 118 (1998). Where there are *no* congressional findings, the Court must scrutinize carefully the constitutional sufficiency of the nexus to interstate commerce (*Copp Paving*, 419 U.S. at 197 n.12; *Wirtz*, 392 U.S. at 192; *Darby*, 312 U.S. at 120-121), in order to "safeguar[d]" local interests against undue agency intrusion. *Yonkers* v. *United States*, 320 U.S. 685, 690-692 (1944). Absent a congressional finding to the contrary, the occasional landing of birds on an isolated pond is plainly insufficient to invoke federal jurisdiction over "interstate commerce."

4. Finally, this Court held in *Lopez* and *Morrison* that the asserted connection to interstate commerce must not be so attenuated as to threaten the constitutional principle of enumerated powers. In *Lopez*, for example, the Court emphasized that the government's reasoning would permit Congress to "regulate not only all violent crime, but also all activities that might lead to violent crime," as well as any activity "related to the economic productivity of individual citizens." 514 U.S. at 564. In *Morrison*, the Court noted that the rationale supporting VAWA would justify federal regulation of "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," along with other areas of traditional state regulation whose "aggregate effect * * * on the national economy is undoubtedly

significant." 120 S. Ct. at 1752-1753. These results, the Court held, were irreconcilable with Our Federalism. *Lopez*, 514 U.S. at 564-568; *Morrison*, 120 S. Ct. at 1754.

The rationale relied on below involves a causal chain even longer and more speculative than those rejected in *Lopez* and *Morrison*. The Seventh Circuit reasoned that individual instances of filling isolated ponds might lead to an aggregate loss of waters, which could in turn reduce the population of migratory birds, which could in turn impede the hunting, trapping, and observation of migratory birds. Pet. App. 7a. Because people spend money and cross state lines to hunt, trap, and observe migratory birds, the potential adverse impact on interstate commerce resulting from filling isolated wetlands was said to be substantial. *Ibid.* The Corps relies on a similar theory. Br. in Opp. 19 ("The filling of wetlands and similar aquatic areas that serve as migratory bird habitat directly affects the ability of people to pursue recreational and commercial activities associated with migratory birds").

"If this elaborate chain of contingencies does not stretch the limits of reason, it is hard to imagine a chain that would." Linehan, 2 TEX. REV. L. & POLICY at 419. The consequences of accepting this link to interstate commerce as constitutionally sufficient demonstrate that the migratory bird rule is a "limiter-manque—a limiting rule with no limits." Holman, Note, *After* United States *v.* Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 197 (1995). It is a clear example of what this Court cautioned against in *Maryland* v. *Wirtz*: the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." 392 U.S. at 196 n.27; see *Copp Paving*, 419 U.S. at 198 (a "chain of connection" that "ha[d] no logical endpoint" resulted in "nebulous" jurisdictional limits and did not provide an acceptable "'nexus' to commerce"); *FERC* v. *Mississippi*, 456 U.S. at 758 n.23 (Congress may not "regulate in an area that is only tangentially related to interstate commerce").

As a practical matter, permitting the Corps to regulate any place migratory birds use—or might use—for "their life requirements" (AR 15578) would mean plenary federal authority over land use. Some five billion land birds migrate across North America each year, and migratory flyways cover the entire continental United States. THE ATLAS OF BIRD MIGRATION 54-83 (ed. J. Elphick 1995); R. PETERSON, A FIELD GUIDE TO BIRDS 305-370 (4th ed. 1980). "[A]s birdwatchers will attest, migratory birds will alight almost anywhere." Holman, 15 VA. ENVTL. L.J. at 197. The development of *any* part of a migratory bird flyway could adversely affect birds dependent upon it, and the cumulative effect of development could be substantial. Under this theory, therefore, the Corps would have general land use power.[16]

Land-use planning and landfill siting, we have already explained, are long-standing functions of state and local government. *Supra*, Part I.C.2. SWANCC's proposed balefill was subject to local and state approval, which was granted only after exhaustive consideration of thousands of pages of submissions and multiple public hearings. *Supra*, pp. 5-7. Despite these approvals, SWANCC's project was stopped dead by the

[16] The court of appeals reasoned that the Corps' constitutional argument does not give it authority over "every puddle" because the bird rule permits regulation only of migratory bird "habitat," which the court defined as sites at which migratory birds "'naturally liv[e] or gro[w].'" Pet. App. 7a-8a. Given that billions of migratory birds move freely and continuously from one place to another, it is difficult to imagine how they would "live and grow" except by stopping for food, water, and rest. They do so regularly, as most homeowners know, in backyards that collect water in the spring and fall. Thus, the court's supposed limitation was no limitation at all. Besides, the "habitat" requirement is not part of the Corps' rationale, under which federal regulation is permitted because it protects migratory birds from harm. Migratory birds are presumably affected by the loss of ponds used for resting or feeding, just as they are affected by elimination of waters used as seasonal homes; the same logic would permit federal regulation of both.

Corps' permit denial. The Corps' regulation in this area of traditional state sovereignty, overruling considered judgments of state and local governments, threatens the basic "distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; see *Lopez*, 514 U.S. at 564, 568.

By adopting a sweeping uniform approach, the migratory bird rule thwarts local regulatory schemes and keeps states from performing their role as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). "[S]tunting local policy experimentation" by imposing top-down federal regulation of isolated ponds "can leave in place a dysfunctional national policy, with states unwilling—or unable, thanks to preemption—to solve the problem."[17] Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 308 (2000). This intrusion in an area of traditional local control weighs heavily against a finding that migratory bird-based jurisdiction over isolated waters is necessary and proper to protect interstate commerce. See *Printz* v. *United States*, 521 U.S. 898, 923-924 (1997); Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 100-101 (1985).

If the Corps' argument for regulatory authority is constitutionally sufficient, it is difficult to envision an arena of human life immune from federal control. The Corps relies on the nexus between migratory birds and bird-related hobbies that impact interstate commerce to justify regulation of the birds' environments. The hobbies themselves, however, are engaged in by people. It seems safe to assume that, whatever effect migratory

[17] There is good reason to believe that regulation of isolated waters under the migratory bird rule is a "dysfunctional policy." See Adler, 29 ENVTL. L. at 63-66 (discussing trends in wetlands losses and incentives to destroy wetlands created by the current federal regulatory system, and finding "little evidence" that Section 404 regulation has prevented wetlands loss).

birds might have on interstate commerce, the effect of hunters, trappers, and birdwatchers is even greater. Why would the Corps not be permitted, therefore, to regulate every aspect of the environment of people who hunt, trap, and watch migratory birds? And of course, bird-related hobbies are just a subset of the many leisure activities that impact interstate commerce.[18] The Corps' rationale would permit not only regulation of all those who engaged in those hobbies, but regulation of all of the hobbies' "component parts." The consequences of accepting federal regulation based on a highly attenuated and remote nexus to interstate commerce are clear, and clearly impermissible: federal authority would completely eclipse the authority of the States over local affairs.

Although the commerce power gives Congress broad power, it "is not without effective bounds" (*Morrison*, 120 S. Ct. at 1748), and enforcement of those bounds is "'essential to the maintenance of our constitutional system.'" *Lopez*, 514 U.S. at 555. The Corps has not identified a single factor—regulation of commercial activities, an express nexus to interstate commerce, congressional findings that the regulated activities substantially affect interstate commerce, or a constitutional rationale that justifies the Corps' action yet would not lead to unlimited federal power—to justify the migratory bird rule. Under *Lopez* and *Morrison*, the Corps' asserted jurisdiction in this case is outside the scope of the Commerce Clause.

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[18] For example, hobbyists annually spend $4.3 billion on needlework and sewing supplies (Hobby Industry Ass'n, *1996-1997 Size of Craft/Hobby Industry Study, Executive Summary*, <www.hobby.org/size.html> (vistited July 19, 2000)); $7.3 billion on woodworking supplies (Bulkeley, *As a Work of Art, Windsor Chair Gets a Standing Ovation*, WALL ST. J., Aug. 15, 1997, at A1); and $22 billion on their gardens (Brown, *It's Already Spring*, BOSTON GLOBE, Mar. 1, 1998, at 1). They travel interstate to attend shows and events, bid at auctions, study, view exhibits, visit gardens, and for a myriad of other reasons tied to their hobbies, spending billions of dollars in the process.

B. The Commercial Nature Of SWANCC's Landfill Is Not A Proper Basis For The Corps' Jurisdiction

The Corps implies that applying the migratory bird rule in this case is constitutional because SWANCC's balefill "is clearly an economic activity." Br. in Opp. 11 n.6. Of course, nothing in the migratory bird rule even hints that jurisdiction over isolated waters depends on their being threatened by an interstate commercial activity. To the contrary, the bird rule is a blanket rule purporting to declare that "degradation or destruction" of isolated waters that are or could be migratory bird habitat—which the Corps says may occur by the quintessentially noncommercial acts of walking or bicycling through—*automatically* "affect[s] interstate commerce." Pet. App. 39a, 40a; 58 Fed. Reg. at 45,020.[19]

The Corps has not explained why it is appropriate to focus on the commercial nature of the local fill activity, when that nexus to interstate commerce *is wholly unrelated to the migratory bird rule under which the Corps purports to regulate or to the constitutional nexus identified by Congress as the basis for the Clean Water Act*. This Court has never previously upheld the application of a statute or regulation based on a nexus between the regulated conduct *in that case* and interstate commerce, where the statute or regulation itself lacked a substantial relationship to interstate commerce. To the contrary,

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[19] Though SWANCC's landfill would be *commercial*, it would not be *interstate*. The balefill would accept only municipal waste from SWANCC communities, processed at SWANCC's transfer station. *Supra*, p. 3. The local transport of local refuse to the local dump, under the auspices of local government, does not substantially affect interstate commerce. It is "completely internal." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824); see *United States* v. *Oregon State Med. Soc.*, 343 U.S. 326, 338-339 (1952) ("wholly intrastate" activities of medical plans were outside the commerce power, though plans made "sporadic and incidental" out-of-state payments); *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 341-342 (1991) (Scalia, O'Connor, Kennedy, and Souter, JJ., dissenting).

the *Lopez* Court disregarded the fact that the challenged conduct there was indisputably commercial—the defendant had been paid $40 to deliver the gun to another student—when it held that GFSZA was outside the scope of the commerce power. See *United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993); *United States* v. *Lopez*, No. 93-1260, Brief for the United States at 7 (June 2, 1994). Similarly, the Corps' post hoc rationalization for applying the migratory bird rule in this case, and this case alone, should be rejected, given the total disconnect between the statutory and regulatory basis for asserting jurisdiction and the tie now asserted to commercial activity. The Corps, after all, is not regulating business; it is regulating waters that provide habitat for birds—a far cry from "that commerce which concerns more states than one." *Gibbons*, 22 U.S. (1 Wheat.) at 194.[20]

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[20] This Court should also reject the Corps' claim that it has unbridled discretion to expand its own reach under the CWA by deciding for itself that a water or activity is within the commerce power. A delegation of this magnitude would not withstand constitutional review. See *supra*, Part I.D.2; *Loving* v. *United States*, 517 U.S. 748, 758 (1996) (Congress may not convey "the lawmaking function" to an administrative agency); *Guardians Ass'n*, 463 U.S. at 613-614 & n.2 (O'Connor, J., concurring). As Professor Tribe has noted, "[a]n agency exercising delegated power is not free, as is Congress itself, to exercise the full sweep of its authority to pursue any and all ends within the affirmative reach of federal legislative authority." 1 L. TRIBE, *supra*, at 982. This Court need not decide that constitutional question, however, for there is no evidence—much less the clear evidence required (*National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974); *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958))—that Congress meant the Corps to have sweeping quasi-legislative authority over waters unrelated to navigable waters.

C. Regulation Of Isolated Waters Used By Migratory Birds May Not Be Upheld On The Theory That Migratory Birds Travel Interstate

Several members of this Court have observed that the migratory bird rule appears to be based on an assumption that "the self-propelled flight of birds across state lines" is sufficient for federal regulation of their habitat. *Cargill*, 516 U.S. at 958 (Thomas, J.); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701, Tr. of Oral Argument 18-20 (Oct. 16, 1985). This argument presumably turns on Congress' power to "protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558; *Morrison*, 120 S. Ct. at 1749; see *Riverside Bayview*, Tr. of Oral Argument 18-19 (Assistant Solicitor General K. Oberly) (arguing that "the migration of birds is interstate commerce").

Congress, however, has no authority to regulate the environment of every person or thing that crosses a state line. Like migratory birds, people cross state lines frequently, yet this Court struck down VAWA, which was intended to protect against gender-based violence. *Morrison*, 120 S. Ct. at 1754. And in *Lopez*, this Court easily concluded that GFSZA was not a regulation of things in interstate commerce, though guns or their component parts frequently are transported interstate. 514 U.S. at 558. Similarly, regulation of the environment of migratory birds is not within Congress' power to protect things in interstate commerce.

To hold otherwise would allow the second *Lopez* category to swallow the other two categories and eliminate enforceable limits on federal power. Congress could "enact a federal law of torts covering any wrong done while wearing apparel any part of which had traveled interstate," or punish any crime that results in a loss of currency that has traveled interstate. 1 L. TRIBE, *supra*, at 831 n.29. Virtually any activity could be regulated under the guise of "protecting" a person, thing, or animal that travels interstate. These unthinkable results demonstrate the fallacy of relying on the interstate travel of birds as a sufficient constitutional basis for the migratory bird rule. See

Lopez, 514 U.S. at 567-568 (rejecting a conception of the Commerce Clause that eliminates the "distinction between what is truly national and what is truly local"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (same).

D. The Corps' Jurisdiction May Not Be Upheld Under The Treaty Power

The Corps and the court of appeals have identified international treaties and conventions, to which the United States is a signatory, that protect migratory birds. Br. in Opp. 21; Pet. App. 8a. These treaties are not a basis for upholding the migratory bird rule.

Article II, Section 2 of the Constitution provides that the President has "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." Under the Necessary and Proper Clause, Congress may enact legislation to carry out the Nation's obligations under its treaties. *Missouri* v. *Holland*, 252 U.S. at 432; *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901). The government has not suggested, nor could it, that Section 404 of the Clean Water Act was enacted pursuant to a treaty. *Cf.* 16 U.S.C. § 703; *id.* § 3901(b); *id.* § 4401(b).

In order to uphold the migratory bird rule under the treaty power, this Court would have to find that the treaty power gives the Executive authority to enforce by regulation the Nation's treaty obligations even when Congress had not passed legislation to do so. Under our constitutional system of separated powers, Congress, *not* an administrative agency, is given the authority to determine whether and how to legislate. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114 (1976); *Greene*, 360 U.S. at 507; *Kent*, 357 U.S. at 129; *National Cable Television Ass'n*, 415 U.S. at 341-342. The Corps may not invoke the treaty power to uphold a regulation where Congress has not legislated to enforce that treaty, and the challenged regulation is not promulgated pursuant to such a statute.

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None of the rationales offered by the Corps provides a constitutional basis for asserting jurisdiction over isolated, water-filled mining trenches because they are (or could be) habitat for migratory birds. This result in no way threatens the federal government's ability to protect the environment, nor does it throw into doubt existing environmental laws.

Many environmental laws regulate commercial activity. See R. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 143-146 (1992). As such, they are clearly permissible under the commerce power. Furthermore, Congress has passed a plethora of environmental statutes, including numerous laws that protect birds and wetlands, under its spending, property, and treaty powers. See *Missouri*, 252 U.S. at 431-432; Strand, *Federal Wetlands Law: Part III*, 23 ENVTL. L. REP. 10,354 (1993). For example, this Court observed in *North Dakota*, 460 U.S. at 301-305, 309-310, that the United States, acting pursuant to the Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.*, and the Migratory Bird Hunting Stamp Act, 16 U.S.C. § 718 *et seq.*, had by 1977 purchased "more than 276,000 acres of North Dakota land for use as migratory bird refuges" and bought easements over another 750,000 acres to preserve "'small wetland and pothole areas'" for "waterfowl habitats." The North American Wetlands Conservation Act, 16 U.S.C. § 4401 *et seq.*, authorizes the use of federal funds to acquire, restore, and manage federal and private land for conservation purposes, including conservation of migratory bird habitat. The Water Bank Act, 16 U.S.C. § 1301, authorizes federal payments to private landowners to implement conservation plans "to preserve and improve habitat for migratory wildfowl." See also, *e.g.*, Emergency Wetlands Resources Act, 16 U.S.C. § 3901 *et seq.* (creating sources of revenue for the migratory bird conservation fund and authorizing acquisition of additional wetlands to "fulfill international obligations contained in various migratory bird treaties" (*id.* § 3901(b)); Endangered Species Act, 16 U.S.C. § 1531(a)(4), (5); Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* In addition, some federal regulation of noncommercial activity with environmen-

tal consequences may be permitted if Congress determines that the regulated activities have a substantial relation to interstate commerce and makes findings to support its conclusion.

The vast scheme of federal environmental regulation would therefore be essentially untouched by a decision in this case invalidating asserted federal authority over completely isolated interstate waters used by migratory birds. In the end, the most significant effects of such a ruling may be to destroy the Corps' illusion that it has plenary land use planning authority, and to restore state environmental and land use regulation to the "primary" position that Congress manifestly intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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